



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 212, and 252

[Docket DARS-2019-0047]

RIN 0750-AJ52

Defense Federal Acquisition Regulation Supplement: Expediting Contract Closeout (DFARS Case 2017-D042)

AGENCY: Defense Acquisition Regulation System, Department of Defense (DoD)

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to permit expedited contract closeout through a waiver by the contractor and the Government of entitlement to any residual dollar amounts that are due to either party at the time of contract closeout. The changes are necessary to establish an expedited contract closeout agreement that will save administrative costs for both the contractor and the Government.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*] .

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly Ziegler, telephone 571-372-6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 85 FR 19719 on April 8, 2020, to implement an expedited contract closeout process in the DFARS. The rule adds a new contract clause at DFARS 252.204-7022, Expediting Contract Closeout, and a prescription for the clause at DFARS 204.804-70. The clause will be used when the contracting officer intends to expedite the contract closeout process by having the contractor and the Government waive entitlement to a residual dollar amount up to \$1,000 at the time of contract closeout. Four respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. One respondent provided a comment on the DoD budget that was outside the scope of this rule. A discussion of the remaining comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

Minor edits were made to the final rule to account for baseline updates necessitated by publication of other DFARS interim or final rules. Edits were made to the proposed rule to clarify the Government's intent regarding the determination of a residual amount.

B. Analysis of Public Comments

1. General Support for the Rule

Comment: Some respondents express support for the rule.

Response: DoD acknowledges support for the rule.

2. Application of the Rule

Comment: Some respondents support expanding the application of the expedited closeout process to other procurements, to include those issued under FAR parts 8, 15, and 16, and DoD-funded assisted acquisitions regardless of awarding agency.

Response: The rule does not exclude DoD contracts or orders issued against DoD contracts. DoD does not have the authority to impose the expedited contract closeout clause on non-DoD contracts or assisted acquisitions conducted by non-DoD agencies.

3. Clarification of the Process

Comment: Some respondents express concern about the bilateral agreement to waive the entitlement of up to \$1,000 occurring in advance of contract closeout. A respondent recommends that the determination to invoke the clause and the expedited contract closeout process be mutually agreed by the Government and contractor at time of contract closeout.

Response: Use of the clause is not mandatory. The rule permits contracting officers to insert the clause in solicitations and resulting contracts, at their discretion, unless the successful offeror indicates they do not agree to the inclusion of the clause in the resulting contract. The agreement to waive the entitlement at the time of contract award permits the Government and contractor to complete the applicable closeout procedures at FAR 4.804, without having to execute a bilateral contract modification to invoke the clause or close

the contract. The Government and contractor should reach a bilateral agreement during the normal closeout processes in FAR 4.804. The text of the final rule is revised to clarify that completion of the contract closeout procedures at FAR 4.804 is required.

Comment: Some respondents request clarification on how the residual amount will be determined.

Response: Contracting officers are still required to complete all of the applicable closeout requirements at FAR 4.804 when executing the expedited contract closeout procedures under this rule. The closeout requirements at FAR 4.804 should result in a determination of any residual dollar amounts owed to either party at the end of the contract.

4. Integrity and Public Trust

Comment: A respondent expresses concern that the proposed rule might negatively impact public trust because the waiver process may provide a mechanism for abuse by either contractors or the Government. Of specific concern is the potential for a contractor being permitted to provide less than the contract requires or, conversely, with the Government paying less than is legitimately owed under the contract price structure. The respondent expresses concern that public perception of the potential for abuse could outweigh the benefits of the intended cost efficiencies.

Response: FAR 4.804-5 directs contracting officers to initiate contract closeout after receiving evidence of physical completion, as defined in FAR 4.804-4.

5. Initial Regulatory Flexibility Analysis

Comment: A respondent questions whether the impact on small business was accurately reflected in the initial regulatory flexibility analysis and asserts that the numbers were not comprehensive enough to estimate the impact on small business.

Response: See section VI of this preamble for revised and expanded analysis of the impact on small business.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items.

This rule creates a new clause at DFARS 252.204-7022, Expediting Contract Closeout. The objective of the rule is to establish an expedited contract closeout agreement and instructions that will save administrative costs for both the contractor and the Government. DoD plans to apply this clause to solicitations and contracts for acquisitions valued at or below the simplified acquisition threshold and to acquisitions of commercial items, including COTS items. These categories of acquisitions are those most likely to benefit from expedited contract closeout.

IV. Executive Order 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory

alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O 13563 emphasizes the importance of quantifying both costs and benefits, or reducing costs, or harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to permit expedited contract closeout through the waiver of entitlement by the contractor and the Government to any residual contract dollar amount of \$1,000 or less at the time of contract closeout. The new DFARS clause will apply to solicitations and contracts, to include contracts valued at or below the simplified acquisition threshold and contracts for commercial items and commercially available off-the-shelf (COTS) items.

The objective of the rule is to avoid expending contractor and Government administrative resources in amounts greater than a residual contract dollar amount of \$1,000 or less at the time of contract closeout.

One public comment questioned whether the impact on small business was accurately reflected in the initial regulatory flexibility analysis (IRFA) and asserted that the numbers were not comprehensive enough to estimate the impact on small business. The IRFA estimated the impact based only upon those contracts administered by the Defense Contract Management Agency; however, the data did not identify the number of contracts awarded to small entities. Since the initial assessment, DoD-wide data was obtained and a more comprehensive FRFA has been conducted. There were no changes made to the rule as a result of this comment and the expanded analysis.

The rule will likely affect a large number of small entities that have been or will be awarded contracts, including those

under FAR part 12 procedures for the acquisition of commercial items, including COTS items. Data was obtained from the Electronic Data Access module of the Procurement Integrated Enterprise Environment for physically complete contracts that are eligible for closeout and have a residual contract balance that is less than \$1,000 but more than \$0. These actions were then compared to the Federal Procurement Data System to estimate the number of those contracts awarded to small entities; however, the data did not identify the number of unique small entities.

As of the end of fiscal year 2020, the data indicates that there were an estimated 20,884 DoD contracts with total residual contract amounts valued at approximately \$1,844,101 that meet the criteria for application of the rule. Of those 20,884 contracts, it is estimated that 14,840 contracts with residual contract value of approximately \$1,294,859 were awarded to small entities. The data further reflects that approximately 9,292 contracts had a remaining balance due to the contractor of \$1,000 or less and 5,548 contracts indicated a credit due to the Government of \$1,000 or less.

There are no known, significant, alternative approaches that would accomplish the objectives of the rule.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of

Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 204, 212, and 252

Government procurement.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204, 212, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 204, 212, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

2. Amend section 204.804 by adding paragraph (4) to read as follows:

204.804 Closeout of contract files.

* * * **

(4) When using the clause at 252.204-7022, Expediting Contract Closeout, to expedite contract closeout, determine the residual dollar amount upon completion of all applicable closeout requirements of FAR 4.804.

3. Add section 204.804-70 to read as follows:

204.804-70 Contract clause.

Use the clause at 252.204-7022, Expediting Contract Closeout, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial

items, when the contracting officer intends to expedite contract closeout through the mutual waiver of entitlement to a residual dollar amount of \$1,000 or less determined at the time of contract closeout.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

4. Amend section 212.301 by adding paragraph (f)(ii)(M) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(ii) * * *

(M) Use the clause at 252.204-7022, Expediting Contract Closeout, as prescribed in 204.804-70.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Add section 252.204-7022 to read as follows:

252.204-7022 Expediting Contract Closeout

As prescribed in 204.804-70, use the following clause:

Expediting Contract Closeout (MAY 2021)

(a) At the conclusion of all applicable closeout requirements of Federal Acquisition Regulation 4.804, the Government and Contractor shall mutually agree on the residual dollar amount remaining on the contract. Both the Government and Contractor agree to waive payment of any residual dollar amount of \$1,000

or less to which either party may be entitled at the time of contract closeout.

(b) A residual dollar amount includes all money owed to either party at the end of the contract and as a result of the contract, excluding amounts connected in any way with taxation or a violation of law or regulation.

(c) For purposes of determining residual dollar amounts, offsets (e.g., across multiple contracts or orders) may be considered only to the extent permitted by law.

(End of clause)